

August 23, 2010

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: Comments on EPA's Proposed Rules, "National Emission Standards for Hazardous Air Pollutants for Major and Area Sources: Industrial, Commercial, and Institutional Boilers," 75 Fed. Reg. 32,006 and 75 Fed. Reg. 31,896 (June 4, 2010), Dockets No. EPA-HQ-OAR-2002-0058 and EPA-HQ-OAR-2006-0790**

Dear Administrator Jackson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments in response to the U.S. Environmental Protection Agency's proposed rulemakings, "National Emission Standards for Hazardous Air Pollutants for Major and Area Sources: Industrial, Commercial, and Institutional Boilers, 75 Fed. Reg. 32,006 and 75 Fed. Reg. 31,896 (June 4, 2010). These rules would impose significant new regulatory costs on 200,000 boilers being operated by businesses, institutions, and municipalities across the country. Advocacy has a number of significant concerns with EPA's proposed rules, based on the views of small entities communicated to us throughout the rulemaking process.

EPA has chosen not to follow the recommendation of small entity representatives to either adopt a Health-Based Compliance Alternative for hydrogen chloride (HCl) and manganese emissions or make a determination that adopting such an alternative emission standard is inconsistent with, or unlawful under, the Clean Air Act. Similarly, EPA rejected small entity representatives' suggestions that the agency create additional subcategories for regulation (including one for limited-use boilers), and that the agency minimize the monitoring and reporting requirements of these rules, and that the agency seek public comment before requiring a mandatory "energy audit" of boilers. Advocacy believes that EPA's proposed boiler rules impose emission standards that are virtually impossible for most existing facilities to meet, and are not based on representative boiler performance data. Finally, the very stringent new source boiler standards, in our view,

are more likely to contribute to worse air pollution by deterring companies from purchasing and installing new energy efficient and less polluting boilers in the future.

## **The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.<sup>1</sup> The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),<sup>3</sup> gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a “significant economic impact on a substantial number of small entities,”<sup>4</sup> EPA is required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,<sup>5</sup> and to consider less burdensome alternatives. Moreover, Executive Order 13272<sup>6</sup> requires federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule.

## **Background**

Section 112 of the Clean Air Act requires EPA to list categories and subcategories of major sources and area sources of hazardous air pollutants (HAP)<sup>7</sup> and to establish emission standards for the listed source categories and subcategories. EPA listed industrial boilers, as well as commercial and institutional boilers, for hazardous air pollutant emission standards. EPA has estimated that over one million boilers of varying sizes currently operate in the U.S.<sup>8</sup> Industrial boilers include the boilers used in manufacturing, processing, mining, refining, and many other industries. Commercial and

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<sup>1</sup> 15 U.S.C. § 634a, *et. seq.*

<sup>2</sup> 5 U.S.C. § 601, *et. seq.*

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

<sup>4</sup> *See* 5 U.S.C. § 609(a), (b).

<sup>5</sup> Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

<sup>6</sup> Executive Order 13,272, “Proper Consideration of Small Entities in Agency Rulemaking” (67 Fed. Reg. 53,461 (August 16, 2002)).

<sup>7</sup> “Major sources” of hazardous air pollutants are those that have the potential to emit greater than 10 tons per year (tpy) of any one HAP or 25 tpy of any combination of HAP. “Area sources” of hazardous air pollutants are those that have the potential to emit less than 10 tpy of any one HAP or less than 25 tpy of any combination of HAP.

<sup>8</sup> *See* Final Report, Small Business Advocacy Review Panel on EPA’s Proposed Planned Rule: Combined Rulemaking for Industrial, Commercial, and Institutional Boilers and Process Heaters at Major Sources of HAP and Industrial Boilers and Commercial and Institutional Boilers at Area Sources (March 19, 2009) (“SBAR Panel Report”) at 7.

institutional boilers include boilers used in stores, malls, laundries, apartments, restaurants, hospitals, clinics, nursing homes, schools, universities, churches, hotels, motels, courthouses, and prisons.<sup>9</sup>

On September 13, 2004, EPA promulgated a Maximum Achievable Control Technology (MACT) standard for major source boilers. Petitions for judicial review were filed on the Boiler MACT, which was subsequently vacated by the D.C. Circuit Court of Appeals on June 8, 2007.<sup>10</sup> The court remanded the rule to EPA, requiring EPA to revise the Boiler MACT. In the same decision, the court also vacated and remanded EPA's Commercial and Industrial Solid Waste Incinerator (CISWI) definitions rule, in which the Agency had defined "commercial and industrial solid waste" to exclude materials combusted in units for energy recovery. The court held that the plain meaning of the statute required EPA to regulate under section 129 of the CAA "any" unit which combusts "any" solid waste material. Under section 129, "solid waste" is to have the meaning established by the Administrator under the Solid Waste Disposal Act. Therefore, combustion units that combust any solid waste would be subject to emissions standards under section 129. Combustion units that do not combust any solid waste will be subject to emissions standards under section 112.

EPA was in the process of preparing a hazardous air pollutant rule for area source boilers in early 2007 when the major source Boiler MACT rule was vacated by the Court. After the Court's decision, EPA reinitiated the rulemaking process by designing entirely new standards for major and area sources. At that time, EPA also began developing a revised definition of non-hazardous secondary materials that are solid wastes when combusted<sup>11</sup> and a revised standard for Commercial and Industrial Solid Waste Incineration units.

For the revised Boiler MACT, EPA estimates that there are 2,414 major source facilities with about 11,500 boilers.<sup>12</sup> Approximately 158 (or 7 percent) of these facilities are small entities.<sup>13</sup> EPA further estimates that over one million area source boilers are located at industrial, commercial, and institutional facilities. The vast majority of area source boilers are believed to be located at commercial and institutional facilities, and, thus, generally owned or operated by small entities. Natural gas is the principal fuel type used by commercial and institutional boilers, but about 185,000 boilers combust oil, wood, coal, or other non-fossil and biomass fuels (e.g., landfill gas and agricultural residues).

On January 22, 2009, EPA convened a Small Business Advocacy Review Panel under section 609(b) of the Regulatory Flexibility Act.<sup>14</sup> Small Entity Representatives (SERs) recommended that EPA minimize the burden of compliance on the numerous small entities that operate boilers. Specific recommendations included:

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<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (June 8, 2007).

<sup>11</sup> Advocacy submitted comments to EPA on the revised definition of non-hazardous secondary materials that are solid wastes when combusted on July 30, 2010. These comments are available at [http://www.sba.gov/advo/laws/comments/epa10\\_0730.html](http://www.sba.gov/advo/laws/comments/epa10_0730.html)

<sup>12</sup> SBAR Panel Report at 7.

<sup>13</sup> SBAR Panel Report at 7.

<sup>14</sup> 5 U.S.C. § 609(b).

- Small facilities should have limited monitoring/testing requirements, and less frequent reporting to state and federal authorities;
- EPA should allow facilities to use work practice standards rather than emission limits;
- EPA should adopt a Health-Based Compliance Alternative under section 112(d)(4) of the Clean Air Act for threshold pollutants where facilities can demonstrate insignificant risk to neighboring residents;<sup>15</sup>
- EPA should adopt several subcategories for boilers based on fuel type, boiler design, duty cycle, geographic location, boiler size, burner type, and limited use boilers;
- EPA should consider requiring annual boiler tune-ups as a way to improve boiler efficiency instead of emissions standards;
- EPA should allow emissions averaging at sources with multiple regulated units; and
- Area sources should be exempted from Title V permitting requirements.

In light of these SER comments, on March 23, 2009 the SBAR Panel Report recommended (1) EPA should consider work practice standards rather than emission standards wherever possible, focusing on work practices that improve combustion efficiency, (2) EPA should take comment on facility energy assessments to improve efficiency, (3) EPA should allow subcategorization of boilers by size, type, use, duty cycle (including limited use), etc., (4) EPA should adopt a Health Based Compliance Alternative under section 112(d)(4), (5) EPA should allow emissions averaging at sources with multiple regulated units, and (6) EPA should exempt area source boilers from Title V requirements. The Panel Report recommended that EPA consider requiring annual tune-ups, including standardized criteria outlining proper tune-up methods targeted at smaller boiler operators. The panel further recommended that EPA take comment on the efficacy of energy audits at improving combustion efficiency and the cost of performing the audits, especially to smaller boiler operators.

The proposed rules for major and area source boilers were signed by the EPA Administrator on April 29, 2010, and were subsequently published in the Federal Register on June 4, 2010. The proposed rules include some of the recommendations of the SBAR Panel Report,<sup>16</sup> but EPA did not adopt several other key recommendations.

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<sup>15</sup> See 42 U.S.C. §7412(d)(4). The Clean Air Act explicitly provides that alternative limits can be derived for threshold chemicals where the Agency finds that such limits provide an ample margin of safety to the nearby residents. In formulating this provision, Congress explicitly recognized that “[f]or some pollutants a MACT emission limitation may be far more stringent than is necessary to protect public health and the environment.” S. Rep. No. 101-228 (1990) at 171. In the vacated Boiler MACT, there were two HBCA (HCl and manganese) limits that were established that a facility could use to demonstrate a lack of significant risk to the surrounding community. Several SERs commented that adopting an HBCA for both HCl and manganese would perhaps be the most important step EPA could take to mitigate the serious financial harm the Boiler MACT would otherwise inflict on small entities using solid fuels nationwide and, therefore, HBCA should be a critical component of any future rule to lessen impact on small entities.

<sup>16</sup> Significantly, EPA did propose to exempt area sources from Title V permitting requirements and to require yearly boiler tune-ups for gas-fired boilers to improve boiler efficiency in lieu of very expensive emission standards. Advocacy supports these aspects of the proposed rules.

On May 19, 2010, and July 23, 2010, Advocacy hosted small business roundtables to obtain additional small business input on this issue.

***EPA Should Have Adopted A Health-Based Compliance Alternative (HBCA) Which Provides Alternative Emission Limits for Threshold Chemicals***

EPA has proposed not to exercise its discretion to use section 112(d)(4) to establish a health-based emission standard for HCl and manganese, despite acknowledging that it has such discretion under the Clean Air Act. For its part, the Boiler MACT Panel Report recommends that “EPA adopt the HBCA as a regulatory flexibility option for the Boiler MACT rulemaking. The panel recognizes, however, that EPA has concerns about its legal authority to provide and HBCA under the Clean Air Act, and EPA may ultimately determine that this flexibility is inconsistent with the Clean Air Act.”<sup>17</sup> In fact, EPA has not determined that the 112(d)(4) discretion is inconsistent with the Clean Air Act, nor has it determined that a health-based emission standard cannot be developed for HCl. Rather, EPA simply takes that position that it does have sufficient information to establish an HCl standard under section 112(d)(4), and EPA failed to adequately explain why it is failing to reaffirm the HBCA approach it adopted in the 2004 final boiler rule. Further, the Department of Justice, stated in its brief defending the previous use of 112(d)(4) in the boiler rule, that claims that the statute precludes the adoption of alternative standards was “meritless.”<sup>18</sup> Significantly, small entity representatives commented during the Panel that “adopting an HBCA . . . would be the most important step EPA could take to mitigate the serious financial harm the Boiler MACT would otherwise inflict on small entities . . . [t]herefore, HBCA should be a critical component of any future rule to lesson impact on small entities.”<sup>19</sup> Because EPA has not determined that an HCl HBCA is inconsistent with the Clean Air Act, EPA should have followed the unanimous Panel recommendation and adopted the HBCA for HCl and manganese as a regulatory flexibility option. Such an alternative alone is widely expected to save substantial capital and annual costs, and prevent a significant number of plant shutdowns and job losses, with no detriment to environmental protection.<sup>20</sup>

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<sup>17</sup> SBAR Panel Report at 23.

<sup>18</sup> “Environmental Petitioner’s claim that the statute precludes EPA from establishing alternative standards for threshold pollutants (which petitioners mischaracterize as an exemption) is meritless. Final Brief For Respondent United States EPA, D.C. Cir Case No. 04-1385 (December 4, 2006) at 53-54.

<sup>19</sup> SBAR Panel Report at 23.

<sup>20</sup> In the 2004 final Boiler rule, vacated for other reasons, it was estimated that the HBCA approach saved over \$2 billion. See American Forest and Paper Association comments filed August 23, 2010 in this docket. The AF&PA SER comments estimated capital savings in excess of \$100 million just for the small facilities in the pulp & paper sector. SBAR Panel Report at 41. It was disappointing that EPA’s discussion of the alternative approach provided no assessment of what costs might be saved by this alternative approach, and that might explain why this alternative was not more seriously considered.

### ***EPA Should Have Adopted Additional Subcategories***

SERs recommended that EPA adopt the following subcategories for boilers:

- Fuel type (including coal rank, bagasse, biomass by type, and oil by type);
- Boiler design type (e.g. fluidized bed, stoker, fuel cell, suspension burner);
- Duty cycle;
- Geographic location;
- Boiler size;
- Burner type (with and without low-NOx burners);
- Process heaters;
- Limited use boilers.

Subcategorization as outlined above was a primary flexibility concern of the SERs during the SBREFA panel. The panel report states that, “SERs commented that subcategorization is a key concept that could ensure that like boilers are compared with similar boilers so that MACT floors are more reasonable and could be achieved by all units within a subcategory using appropriate emission reduction strategies.”<sup>21</sup> While the Panel did recognize that the entire list of potential subcategorizations asked for by SERs was not practicable because of overlap in the categories, EPA should have proposed some additional subcategories as recommended by the panel. EPA has almost complete discretion to establish any subcategories “as appropriate.”<sup>22</sup> Without the additional subcategories, it increase the cost and difficulty for many small sources to meet emissions standards when they are placed in a category that is driven by the efficiency of very different boiler units running on different fuels, under different duty cycles, and most likely designed for very different purposes. In many cases, forcing boilers into categories where they do not belong will require costly investments to meet standards that are simply not achievable for certain boiler and fuel types, while yielding small or insignificant environmental benefits. In particular, it is very hard to justify why limited use boilers should be subject to the same standards as other boilers.<sup>23</sup> EPA did include a “limited use” subcategory for boilers with average capacity factors of 10% or less in the 2004 boiler rule.

### ***EPA Should Have Minimized Facility Monitoring and Reporting Requirements***

Several SERs noted that recordkeeping activities, as written in the vacated boiler MACT, would be especially challenging for small entities that do not have a dedicated

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<sup>21</sup> SBAR Panel Report at 22.

<sup>22</sup> Section 112(c)(1) of the Clean Air Act. EPA may distinguish among classes, types and sizes of sources within a category. House Report No. 101-490, Part 1 at 328.

<sup>23</sup> This contrasts strongly with the treatment of the recent MACT standards adopted for limited use reciprocating diesel and spark ignition engines, promulgated by the Agency in 2010, creating a separate category for limited use engines and emergency use engines (e.g engines that run less than 24 hours per year). EPA does not explain the disparate treatment.

environmental affairs department. The SERs advocated for the most efficient way to get reductions in HAP and requested that the Panel consider all available alternatives to reduce to a bare minimum any extraneous requirements that require a lot of paperwork that in the opinion of the SERs do not contribute to emission reductions.

### ***EPA Should Not Have Proposed the Energy Audit Requirement***

EPA has also proposed requiring major sources to perform an “energy audit” of their boiler and related operations to identify potential energy efficiency improvements. The SERs were concerned with work practice standards that would require costly energy audits and implementation of audit findings. These concerns rested upon the uncertainty of the potential costs and the lack of standardized energy audit criteria. In addition, the SERs commented that it was unclear whether these energy audit requirements for small sources would deliver significant emission reductions beyond those achieved with the annual tune-up requirement.<sup>24</sup> Advocacy’s continuing concern about this proposed requirement stems from current uncertainty about the scope and cost of these audits, and whether there are sufficient auditors to complete the audits within the required timeframe. Because EPA’s concept of an “energy audit” for Clean Air Act purposes may not be the same as an energy audit conducted under the auspices of the Department of Energy, EPA should clarify (1) what is required in an audit, (2) the anticipated benefit of an audit, and (3) what an audit should cost, considering the size and complexity of a given boiler.

### ***EPA’s Proposed Emissions Standards Are Too Stringent***

As noted previously, Advocacy held two roundtables on the boiler rules with a wide variety of potentially affected small entities in attendance. There was widespread agreement among the participants representing a large diversity of manufacturing sectors that this proposal has impractical emissions limits that will be exceedingly costly to meet for almost all facilities.

EPA based emissions limits on a relatively small number of boilers in some subcategories, which in combination with significant non-detect data drove the MACT floor to unreasonably low levels in some cases. EPA needs to refine the statistical approach that it takes to setting emissions limits by taking emissions variability into account for sources, such as boilers. Because of this approach, Advocacy has heard repeatedly that the carbon monoxide (CO) limit will be exceedingly costly for many units to meet under any circumstances.

In addition, the rules cover at least five different HAPs, and in setting the emissions limits for each HAP EPA used the least emitting sources for each individual HAP to define the MACT floor. Unfortunately, combining data from separate sources, provides no evidence that actual existing sources can meet all of the criteria that compose this synthetic (“uber” facility, as it is sometimes labeled) source made up of a collection of the best controlled sources controlling different pollutants. As noted above, data

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<sup>24</sup> SBAR Report at 17.

variability and the heterogeneity of sources lead to significant variation in emissions for each HAP. By cherry-picking the data for each HAP and then combining these emissions limits into a standard for real world sources, EPA has crafted a rule that is costly and impractical. EPA should have instead observed the best-performing real world sources that address all the HAPs and crafted a standard wherein emissions limits mirrored their performance, thereby creating a more real world standard. The stringent new source provision of the proposal likewise will, deter many sources from upgrading to new boilers because the new source performance standards are also based on the emissions of the synthetic source which would be so impractical as to inhibit any potential gains from installing newer, more fuel-efficient, lower emitting technology.

### ***EPA Should Provide More Flexibility for Emissions Averaging***

EPA should have proposed an emissions averaging program more in line with what SERs requested rather than the restricted program outlined in the proposal. Emissions averaging is an option for individual facilities that have multiple affected sources on site that saves money and obtains the identical or better emission reductions. By allowing these facilities to average emissions across various affected units, they can focus their investments on the units that will provide the biggest environmental impact per dollar spent, rather than targeting every affected unit to meet a single limit. This approach has the potential to produce a greater emissions reduction than requiring each individual source to meet the standard, while reducing the cost of compliance to the facility, and has been successfully utilized in several proceeding rulemakings. In the proposed rule, EPA limits the flexibility and potential effectiveness of emissions averaging by placing overly strict limitations on a facility's ability to employ averaging.

First, EPA should base the emissions averaging option on actual operating times and emissions rather than on design capacity of affected units. This would have provided more flexibility for facilities that have backup units or other limited use boilers, especially since EPA chose not to create a limited use subcategory. Second, EPA should not have limited the option to encompass only those sources which fall into the same subcategory based on fuel type. This requirement is unnecessarily restrictive and severely limits the flexibility of emissions averaging. Finally, the 10 percent penalty for choosing emissions averaging is again unnecessarily restrictive and again severely limits the flexibility of emissions averaging. Furthermore, EPA waives the penalty for facilities that average across units emitting from the same stack within a facility, despite the fact that the total emissions from units emitting from the same stack are identical to emissions from units emitting from separate stacks as long as all else is held constant.

Advocacy urges EPA to reconsider the emissions averaging option and to remove the impediments to small entities using it as a viable flexibility option that are outlined above, and similar to previous rules adopted by the Agency. EPA should return to the more basic emissions averaging concept that was discussed during the panel and which the panel report unanimously recommended as an important flexibility option.

## ***Conclusion***

As discussed above, the Agency has failed to utilize the discretion under the Clean Air Act to minimize small business burdens while maintaining environmental protection. The current proposal, if implemented without change, is likely to have significant adverse impacts on American jobs and the US economy. Given the importance of this rule to small businesses, we hope to collaborate closely with EPA in formulating the final regulation.

Please do not hesitate to call me or Assistant Chief Counsel Kevin Bromberg ([kevin.bromberg@sba.gov](mailto:kevin.bromberg@sba.gov)) or (202) 205-6964 if we can be of further assistance.

Sincerely,

Winslow Sargeant, Ph.D  
Chief Counsel for Advocacy

Kevin Bromberg  
Assistant Chief Counsel for Environmental Policy

cc: Cass R. Sunstein, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget